U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 05Nov2002

CASE NO.: 2001-LHC-1647

OWCP NO.: 07-156652

IN THE MATTER OF:

ALFRED D. DEDON, III

v.

HALTER MARINE

Employer

RELIANCE NATIONAL INDEMNITY CO., IN LIQUIDATION, MISSISSIPPI INSURANCE GUARANTY ASSOCIATION, SUCCESSOR-IN-INTEREST[1]

Carrier

APPEARANCES:

Mager A. Varnado, Jr., ESQ.

For The Claimant

Douglas Bagwell, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

[1] The caption appears as amended at the hearing.

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Alfred D. Dedon, III (Claimant) against Halter Marine (Employer) and Reliance National Indemnity Company (in liquidation, Mississippi Insurance Guaranty Association, successor-in-interest)(Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on June 5, 2002 in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 9 exhibits, Employer/Carrier proffered 29 exhibits which were admitted into evidence along with one Joint Exhibit. The record was left open until August 5, 2002 for Claimant to take the treating physician's deposition, which was received as Claimant's Exhibit 10. On July 19, 2002, Employer/Carrier's Petition for Second Injury Fund Relief was admitted as EX-30. On August 29, 2002, Employer was granted leave to admit into evidence Claimant's Social Security Itemized Statement of Earnings, which was received as Employer's Exhibit 31. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of the alleged accident/injury on November 23, 1999.

2. That Employer/Carrier filed a Notice of Controversion on August 1, 2000.

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[2] References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

3. That an informal conference before the District Director was held on February 22, 2001.

4. That medical benefits for Claimant have not been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. Whether the injury occurred in the course and scope of employment.

3. The nature and extent of Claimant's disability.

4. Whether Employer was timely notified of the injury.

5. Whether Claimant has reached maximum medical improvement.

6. Claimant's average weekly wage.

7. Entitlement to and authorization for medical care and services.

8. The reasonableness and necessity of recommended surgery.

9. Whether Employer/Carrier are entitled to special fund relief under Section 8(f) of the Act.

10. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

At the hearing, Claimant testified he was 29 years old with a tenth-grade high school education and a G.E.D. He had "hands-on" vocational experience shipfitting, and primarily performed machine shop work and shipyard work. (Tr. 20). As a shipfitter,

part of Claimant's job included reading blueprints and operating forklifts. (Tr. 41, 73). Claimant occasionally welded and operated forklifts with companies where he worked as a drill operator. (Tr. 41; EX-19, pp. 3-4).

In 1998, Claimant was employed by American International Fabricators (AIF). He performed work as a structural fitter, welding "every once in a while." (Tr. 23).

On a Friday in October 1998, Claimant stated he became injured when performing a job cutting and removing an acid tank. (Tr. 24; EX-4, p. 12). Claimant stated he had no problems "until I was going home," and as "soon as I got out my truck I hit the ground, felt a pain." He explained that the pain "felt like a shock." Over the weekend following the injury, Claimant used a heating pad, which did not help. His pain did not abate by his return to work on Monday, and he sought medical treatment on Tuesday. (Tr. 24).

According to Claimant, AIF would not "send me to the doctor because they claim I could have done it over the weekend for my own recreational time." Claimant stated that AIF "wrote me up a paper and said, sign it and you can work for us, and it said that I didn't hurt myself on that job." Because he refused to sign the document, he stated he could not return to work AIF. (Tr. 25, 48). He did not file a compensation claim, and "it took me a little bit to get some money up to go see a doctor, but I paid my own way to see Dr. Guidry in Gonzales, Louisiana."

Around February 18, 1999, Claimant initially saw Dr. Guidry, complaining of low back pain radiating into his legs "a few months after" his injury with AIF. (Tr. 25, 50). He told Dr. Guidry he had been having the pain for several months. (Tr. 50). Dr. Guidry ordered X-rays, prescribed medicine and physical therapy. (Tr. 51; CX-3, p. 1). Claimant stated he never had the physical therapy. (Tr. 51). Claimant was asked about the X-rays:

> Q Okay. But it's your understanding that those X-rays revealed that you had a natural fusing or a lumbarization, part of your lower spine, isn't that your understanding?
>
> A Yeah. It's something I was born with, is all I understood about it.

(Tr. 53).

On March 10, 1999, Dr. Guidry referred Claimant to Dr. Messina[3] because Claimant's continuing lower back pain radiating into his legs continued. Dr. Messina did not prescribe any medication or therapy, nor did he recommend surgery.[4] (Tr. 25-26).

After he treated with Dr. Messina, Claimant worked for various employers. He worked in a machine shop for Ohmstede in St. Gabriel, Louisiana. There, he was hired as a drill operator. He operated "C&C and radial drills," drilling baffles and tube sheets. He worked 40 hours a week, five days a week, until he quit to move home to Mississippi. (EX-4, pp. 13-14).

When he returned to Mississippi, he became employed by Keith Huber (Huber), a plant making vacuum pump trucks. There, he was "hired into the machine shop, and they moved me to a cut and saw man...." He described the work as "strenuous" and stated there was "steady lifting," involving pipe that was "six and eight inches around." He explained that doors on which he worked weighed "a good 30 pounds, and I had to cut them and move them several different ways to get the complete cut on them." He added that he had no problems performing the work. (Tr. 27-28, 56-57; EX-4, p. 14). Claimant stated he earned $11.00 or $11.25 per hour, and "worked pretty much a 40-hour week." (Tr. 57).

In September 1999, Claimant began working for Employer, which hired him as a shipfitter. (Tr. 20). He usually worked over 40 hours a week, "between 50 and 70 [hours] sometime." He described the demands of his work as "hard and steady," requiring him to lift his tool bucket with about 40 pounds of tools in it from job to job. Additionally, he pulled lines, moved steel around, and picked up "things you can lift." (Tr. 22).

When he began working for Employer in September 1999,

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[3] While Claimant refers to Dr. Messina as a neurosurgeon, Dr. Messina is labeled as an "orthopedic surgeon" by Employer's Counsel. (Tr. 25, 53). Dr. Messina practices with The Bone and Joint Clinic of Baton Rouge, Inc., a practice limited to Orthopedic Surgery. (CX-3, p. 4). Dr. Guidry's notes reflect he referred Claimant to an "orthopedic surgeon." (EX-8, p. 6).

[4] Claimant stated he did not have his low back pain "for a couple of years prior to March 10, 1999," despite an indication in Dr. Messina's record that Claimant may have injured his back earlier in Minnesota. (Tr. 54-55). He added that he had never been to Minnesota and had no idea why Minnesota would be reflected in the records of Dr. Messina. (Tr. 82).

Claimant had a physical examination including urine testing, hearing tests, eyesight evaluations, and physical range of motion tests. "We had to stretch ... just like touch your toes," Claimant stated. He was "cleared to work" with Employer, and was having no problems with his back in September 1999. (Tr. 29; EX-7, pp. 31-37).

"About a month into it," Claimant started experiencing "extra soreness, started feeling kind of sore after work." (Tr. 30). He experienced pain similar to his lower back pain that radiated into his legs in 1998, but the pain in 1998 was "not as bad." (Tr. 49). Claimant identified no specific event or activity that caused his pain; rather, it was a gradual worsening of back complaints and pain going down into both legs. (Tr. 42). He described the pain:

> Mostly it just – you know, it was just constant pain after work. If I sat still after work for any time, my back kind of locked up in place, you know, kind of hard to move around. And then it – every day it got worse and worse, and we were working a whole lot of hours, so I just kind of figure, well, I'm not giving me any time to rest it off, until the fact that it got real bad. It got to where I missed a couple of days. I had to call in .... I worked as long as I can. Apparently this back condition is back again.

At the time, Claimant stated he was working a "seven-day week, however many hours, 12, 14. There were a lot of hours." (Tr. 30-31).

"About a month" before Claimant's last day of employment with Employer, he observed:

> My back started burning real bad, and I'd get in on the evenings, and normally if I hit the couch I'd stay there because I couldn't even get up to get in bed. I just figured it was, you know, from the last injury in October '98, which I was informed by my neurosurgeon at the time in Baton Rouge that, just suck it up and live with it, there's nothing he can do about it.

(Tr. 23; EX-4, p. 47).

By November 23, 1999, Claimant stated his pain increased such that he had difficulty walking in the morning before he came to work. According to Claimant, it was "the same pain every morning." Nonetheless, he was able to walk to and do some work.

Claimant stated, "it was just rough getting started in the mornings is all it was." (Tr. 42-43).

On November 23, 1999, Claimant could not climb a stairwell at work to gather his tools. When he was unable to make it to the top of the stairwell, he sought his foreman, Harvey Toche, and "told him about my situation." Claimant recalled that Mr. Toche "went up and got my tools for me." He further explained:

> [Mr. Toche] was concerned that I just hurt myself, that I had done something. And I said, no, sir, you know, it was – it's from another thing, a neurosurgeon done seen me in Baton Rouge, and I understand what it is, and it's something I can't avoid, you know.

(Tr. 31). Claimant stated he decided then to leave Employer and explained his situation to "Ms. Iris," who was involved with "hiring, firing, paperwork and rate of pay." From his discussions with her, he understood that he should "rest up" and return "whenever I was healed up...." (Tr. 32).

Upon his resignation on November 23, 1999, an exit interview was conducted, and Claimant signed a form that was "filled out by somebody else." According to that form, Claimant's reasons for leaving are "personal." Claimant testified he did not enter that information on the form. (Tr. 47; EX-7, p. 5).

Prior to November 23, 1999, Claimant could not recall telling anybody with Employer that his back kept getting worse. On November 23, 1999, Claimant stated that he discussed his prior medical condition with Mr. Toche and "Ms. Iris."[5] He also stated

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[5] On September 9, 2000, Claimant signed an Acknowledgment of Injury Reporting Procedures, which provides:

> I understand that I must <u>immediately</u> report any on-the-job injury to the manager or relief manager before leaving the premises. I hereby acknowledge that on-the-job injury reporting procedures were discussed as part of my orientation for work....

(EX-7, p. 12).

Claimant was previously injured on September 23, 1998 while working at AIF. He "knew he was at fault and did not report it to his supervisor at the time." (EX-17, p. 4). A note signed by Claimant on November 30, 1998 provides:

that he discussed his prior medical condition with Rick Grimstead[6] after Claimant left Employer. (Tr. 33).

On November 30, 1999, Claimant stated that he visited Dr. Tamboli, complaining of low back pain which "was getting worse of late, with radiation down into the... legs and buttocks...." Dr. Tamboli recommended an MRI, which was performed by Dr. Danielson. (Tr. 62-63). Claimant also saw Dr. Ray Shabti, a general practitioner. Claimant explained that he had communications problems with Dr. Shabti, who spoke and understood little English. (Tr. 65-66; EX-4, p. 30).

On January 21, 2000, Claimant and his wife filled out a patient history form for Dr. Danielson. Claimant stated he identified the cause of his back pain as "working construction, gouging an acid tank, millwright, crating and moving." He explained that his back pain actually "cleared up completely" within "that five- or six-month period from October of '98." By then, he stated he had no more back pain radiating into his legs. Nonetheless, he assumed the October 1998 injury was the cause of his pain on January 21, 2000 because he relied on Dr. Messina's earlier conclusion regarding treatment for the October 1998 injury. (Tr. 66-68; EX-4, p. 28).

On March 16, 2000, Claimant saw Dr. Danielson, who "sent me for x-rays first, and then MRI." Claimant discussed options with Dr. Danielson, but Claimant stated, "In my opinion, it didn't look good." (Tr. 34). Claimant stated that he could not recall the date, but he found out for the first time from Dr. Danielson that he injured his back while working for Employer (Tr. 61-62; EX-4, p. 41; EX-14, p. 44). Claimant explained:

> Judging by my two disks, there's no way I could have worked for [Employer]. I could not have had it pre-employment, that I thought I had. When he diagnosed me

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> Personnel offered to set up a doctor's appointment and contact workman's [sic] comp. but due to employee not reporting this incident to his supervisor they might not cover the expense and he would be responsible for the bill. He did not want to do that.

(EX-17, p. 5).

[6] According to Claimant, Rick Grimstead was a supervisor in the "same area, just different crew." He was not Claimant's supervisor from September 1999 to November 23, 1999, and Claimant did not work for him. (Tr. 59).

> with having two herniated disks and the nerve severed and things like that he had to repair. I said, well, I've been toting that around the whole time. And he said, no, there's no way you could have worked for [Employer] and done the work you claim you could do with them type of injuries. You had to do that recently. That's when I got in touch with [my attorney].

(EX-4, p. 11).

Claimant "waited about a year with pain," but he "couldn't take it no more." He consequently underwent back surgery on November 10, 2000. (Tr. 34). After that surgery was performed, he did not get any better. (Tr. 68).

Dr. Danielson allowed Claimant to try performing a job, "but he didn't release me to go to any hard work or – he put limitations on my release." Claimant tried taking a job in charge of golf course maintenance at Diamond Head Golf Course. (Tr. 35-36). There, he worked for four days until he underwent a physical examination, which revealed that he "had just had my first surgery, November 10th, and this was May.... So they let me go." (EX-4, p. 8). Claimant returned to Dr. Danielson for further treatment. He stated, "We went through myelograms, EKGs, MRIs, more x-rays." (Tr. 36).

On August 21, 2001, Claimant treated with Dr. Steve Schepens, complaining of lower back problems and neck pain since the first surgery. Dr. Schepens referred Claimant back to Dr. Danielson, who recommended and performed another low back surgery at a different level in November 2001. Dr. Danielson and Claimant decided against neck surgery at that time. (Tr. 70-71).

On December 7, 2001, "some six weeks after" Claimant's second back surgery, he was hired by Zachry Construction Corporation (Zachry) as "a structural fitter for them, building a power plant in Kentucky." (Tr. 71; EX-4, p. 3). Dr. Danielson had not released Claimant to work, nor did he know Claimant was working. Glen Shaw, Claimant's former co-employee, helped arrange the job at Zachry. Mr. Shaw was a general superintendent who "put me on jobs I knew I could perform." Thus, Mr. Shaw modified the work and put Claimant "on the lighter-type stuff." (Tr. 71-73; EX-4, p. 5).

Claimant's job with Zachry lasted "about a month, a little over a month." (Tr. 36, 73). Claimant stated he did "a lot of blueprint reading," and would get jobs "lined up." He would

number parts to fabricate, call in a forklift or a crane if necessary, and sometimes lifted "materials and things of that nature." (EX-4, p. 5). He stated he experienced back pains, which "got worse again" to the point where he could not lift his tool box, "just like" his experience with Employer. He could not identify any specific event that caused his pain to return. His pain "gradually got worse" until he could work no longer. (Tr. 74). Although he experienced disabling back pain, Claimant identified a "paycheck mistake" as his ground for leaving Zachry. (Tr. 75; EX-19, p. 2). Meanwhile, Dr. Danielson released Claimant in February 2002. (Tr. 36-37).

Claimant did not file a workers' compensation claim against Zachry for the work he performed there. Even though he thought he hurt his back while working for Zachry, he stated that he is not planning to file a claim. (Tr. 80-81).

Claimant has remained unemployed since his employment with Zachry. (Tr. 36, 75; EX-31). He has not "gone anywhere and looked for work anywhere at all." (Tr. 78). He testified that his wife works full time while he takes care of his three children during the day. He prepares his children and delivers them to pre-school and kindergarten. He remains home with his youngest child during the day. He performs the housework, including sweeping and washing clothes. (Tr. 78-79).

Claimant recently obtained Social Security Disability benefits, although he did not know the amount of his payments. (Tr. 37, 78). In December 1999, he applied for unemployment benefits with Mississippi Employment Security Commission, but he was denied benefits because "they indicated you had left [Employer] for personal reasons." Pursuant to the December 1999 application, Claimant could not recall filling out any forms representing that he was "ready, willing and able to work." (Tr. 81-82).

Since his work with Zachry, Claimant has continued to seek medical treatment. He became unhappy with Dr. Danielson and sought treatment with Dr. Terry Smith, who ordered an MRI. (Tr. 75-76). Claimant told Dr. Smith that he "messed something up in Kentucky, and I wanted to find out what it was." Relying on that statement, Counsel for Employer asked Claimant whether his pain stems from his employment in Kentucky rather than employment with Employer. He replied, "I wouldn't know if I done it in Kentucky. It was probably something after the surgery. I could have done that sitting at home." (Tr. 77).

Claimant stated that he had no plans to return to Dr. Smith

and that there are no future medical treatment plans being recommended to him. Rather, he was awaiting qualification for medical benefits under Social Security to find another neurosurgeon. (Tr. 39-40, 76-77).

Claimant described his present medical condition and symptoms. He identified pain "all throughout my back." Since the first back surgery, he has had problems in his neck, "which Dr. Danielson found was a disc that makes my arms go to sleep to my fingertips...." (Tr. 37-39). He added that "I have a constant burning from the middle – lower middle back to all the way lower back, constant problems with sharp pains, shocking pulses." He stated the pains "run down" both of his legs. (Tr. 38).

Claimant explained the effects of the pain on his activities. He described problems with "walking pain," and constant soreness. He stated he can "sometimes" lift "about 20 pounds." Consequently, he concluded that he cannot return to his former employment as a shipfitter. Id.

Mr. Harvey Toche

From September 1999 through November 23, 1999, Mr. Toche was a "lead man" for Employer on the project at which Claimant worked. He recalled he was in charge of a few employees in November 1999. (Tr. 90-91). Mr. Toche's responsibilities were to "assign jobs to each worker, make sure the jobs are getting done and getting done right, handling the budget, time cards, and things like that." (Tr. 86). He stated that Claimant was a member of his crew and that he was Claimant's direct supervisor. (Tr. 86).

Mr. Toche recalled that Claimant's performance was satisfactory and stated he was never aware that Claimant was experiencing "any type of low back pain or complaints." Likewise, Mr. Toche stated he was never aware of any work-related injuries sustained by Claimant to his low back. (Tr. 86-87, 90). Further, Mr. Toche did not recall Claimant telling him that he was having to quit his job because of low back pain. (Tr. 89).

Mr. Toche explained he would have been in a position as lead man to know if an employee had sustained an injury or was complaining of back pain. Mr. Toche could not recall talking to Claimant at all on November 23, 1999; however, standard operating procedure for reporting a disabling injury included sending the injured worker to first aid and telling Mr. Toche's foreman. (Tr. 87, 91). "Then they document it," Mr. Toche explained, "and

then we go from there." (Tr. 92).

Mr. Toche had no recollection of how much Claimant worked from September 1999 to November 23, 1999. He explained, "We had worked different hours when we was on the pontoons. Sometimes eight, nine, 10, 12 hours you know." He added that it was "not the kind of thing" that people always worked seven days a week, twelve hours a day; however, some people would work overtime. Mr. Toche could not recall whether Claimant worked overtime, but he acknowledged that the wage statement would "be a more accurate indicator of that." (Tr. 88-89).

Mr. Irvin Favre

Mr. Favre was "fabrication foreman" during the period from September 1999 though November 23, 1999. According to Mr. Favre, he was Mr. Toche's foreman, and he "would have been over Harvey Toche and his crew." Consequently, Mr. Favre was Claimant's supervisor. (Tr. 94). Mr. Favre had no individual recollection of Claimant, stating, "... we had a lot of people running through in that period...." He stated that, "in most cases, I would deal with them through the leaderman...." Mr. Favre could not recall the number of employees under his charge during November 1999, and he explained, "I know I had as many as 75 people under me at one time, but as we – you know somewhere around in there in that period we had split off into two foremen." (Tr. 97-98).

Mr. Favre was unable to recall any injury Claimant suffered on the job. He was likewise unable to recall Claimant having complaints or problems with his back during work. According to Mr. Favre:

> Normally, if a person has an injury of any kind, he'll either report it to myself or his leaderman, which will eventually report it to me, and he'll be sent to first aid where, when he's sent to first aid, you know, a record will be kept on any injuries.

Such records would be kept, "regardless of how small," and they would be contained in the employment records by automatic procedure. (Tr. 95).

Mr. Favre authenticated his signature on Claimant's termination form and on an exit interview. According to Mr. Favre, he was routinely required to sign the forms for every employee under his charge. (Tr. 98). The termination report was completed and signed by Claimant for Mr. Favre's review and signature. Mr. Favre recognized the date of his signature as

November 23, 1999. Likewise, Mr. Favre stated he was not part of the exit interview but was provided the completed form to add his appraisal and to sign. (Tr. 96-97, 99).

The Medical Evidence

Dr. Kyle J. Guidry, M.D.

In an undated letter to the Office of Disability Determination Services in Mississippi, Dr. Guidry, who practices family medicine, described his treatment of Claimant. According to Dr. Guidry,

> [Claimant] was seen only once in my office on 2/18/99. At that time he complained of low back pain and numbness in both legs. He reported that the pain started 5 months prior to this visit. Upon examination he was diagnosed with back pain and sciatica. He was sent for X-rays and also saw an orthopedic surgeon who prescribed some back exercises. He has not been seen since this initial visit.[7]

(EX-8, p. 6). Dr. Guidry's records include an X-ray report of Claimant's lumbar spine dated February 18, 1999 that describes "disc space narrowing between L4" and "a large right transverse process that fuses to the sacrum." (EX-8, p. 14; EX-9, p. 2).[8]

Dr. Larry J. Messina, M.D.

On March 10, 1999, Dr. Messina, an orthopedic surgeon, noted Claimant was referred from Dr. Guidry's office with complaints related to his low back. Specifically, Claimant listed "lower back, fused bones, deteriorating vertebrae" as the nature of his complaint. Claimant acknowledged that his complaints were <u>not</u> related to a job injury. (EX-10, p. 4). Dr. Messina also noted,

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[7] On November 23, 1999, Claimant's wife requested a report from Dr. Guidry stating that Claimant "was seen for back pain because of a disc fussed [sic] together... Something showing the [diagnosis] and cause of pain." (EX-8, p. 11; EX-4, p. 25). The record is silent regarding any response to that request.

[8] Likewise, an October 13, 1998 report in Claimant's personnel records at Ohmstede include a notation of "transitional, lumbosacral vertebra with a free transverse process on the left and fusion of the right lateral element to the sacrum." (EX-21, p. 18).

"This has been going on for the [sic] about the last couple of years. He thinks he injured it in Minnesota." Although Claimant experienced pain and tenderness in his lower back and legs, his "straight leg raising, deep tendon reflexes, motor and sensory exams at this time are all within normal limits."

Dr. Messina found that X-rays of Claimant's lumbar spine showed "partial lumbarization of the S1 vertebra." Dr. Messina did not know "if that has any bearing or problems at all on his back problem at this time." He recommended hamstring stretching exercises and walking a mile a day to help relieve Claimant's complaints. (EX-10, p. 3; EX-8, p. 6; CX-4, p. 1).

Dr. Kaizad Tamboli, M.D.

On November 30, 1999, Dr. Tamboli first saw Claimant for complaints of ongoing "low back pain, getting worse of late, with radiation down his lower back and posterior to his buttocks and down his thighs, more on the left than the right." Claimant also complained of muscle spasms, tingling, and burning. According to Dr. Tamboli,

> [Claimant] says that he was recently evaluated at a hospital in Gonzales, Lousisiana[9] and lumbar x-rays there revealed [a] transitional segment on the lumbosacral right transverse process that fused to the sacrum and rudimentary disk space between it and the remainder of the sacrum. There is also disk space narrowing between L4 and the transitional lumbosacral segment.

Dr. Tamboli's patient history reflects that Claimant saw an orthopedist who provided pain medications and muscle relaxants that did not significantly help. (EX-11, p. 3; CX-6, p. 1).

Dr. Tamboli noted that a back examination of Claimant revealed decreased range of motion and "tenderness in the lumbosacral area, more on the left than on the right." Dr. Tamboli's assessment included "back pain with paresthesias and radiculopathy with abnormal lumbosacral x-rays." He ordered an MRI and provided Claimant with prescriptions for pain medication.

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[9] Claimant stated that he never went to Gonzales "at any time recently from the time of November 23 of 1999 until [he] saw Dr. Tamboli." Rather, he was sure that Dr. Tamboli was referring to Claimant's visits with Dr. Guidry in March or February 1999. (EX-4, p. 23).

(EX-11, pp. 3-4; CX-6, pp. 1-2).

Dr. Lynn Leatherwood, M.D.

On December 3, 1999, Dr. Leatherwood conducted a lumbar spine MRI, which revealed "annular bulging of the disc at L3-4 and L4-5. Desiccation indicating degeneration of the disc at L5-S1 with central disc protrusion at L5-S1 extending para-centrally to the left." According to the report, the central disc protrusion at L5-S1 impinged "on the neural foramen on the left of that level." It was further noted that Claimant "possibly has lumbarization of S1 indicating [a] sixth lumbar vertebra." AP and lateral views of the spine were recommended at that time. (CX-5, p. 1).

Dr. Ray Shabti, M.D.

On March 6, 2000, Dr. Shabti saw Claimant, whose chief complaint was back pain. He noted Claimant had the pain since "10/98," when it "hit him suddenly and he woke up one morning unable to walk." He observed that Claimant's "back pain has been stable for almost a year with middle back to low back severe back pain with radiation to both legs, more to the left than the right, and tingling and numbness only with sitting." (CX-7, p. 1; EX-12, p. 14). Dr. Shabti's impression included "low back pain with disc bulging and protrusion and radiculopathy." (CX-7, p. 2).

On March 6, 2000 Dr. Shabti ordered lumbar spine x-rays, which were reported on March 7, 2000. According to the report, "disc interspace height is adequately preserved, except for the L5-S1 level which appears to be narrowed. This is thought to be related to partial sacralization of L5." It was noted that there was "no acute abnormality of the lumbar spine. There is no evidence of significant degenerative change." It was further observed that there was "transitional anatomy at the lumbosacral junction with L5 vertebral body appearing to be partially sacralized." (CX-7, p. 7; EX-12, p. 24).

Dr. Harry A. Danielson, M.D.

Dr. Danielson was deposed by the parties on July 15, 2002. (CX-10). His opinions expressed therein were based on reasonable medical probability. (CX-10, p. 10).

On March 16, 2000, Dr. Danielson, a specialist in neurological surgery, first saw Claimant, who was complaining of back pain, including pain in both hips, pain in both legs, and

numbness in both feet. (CX-10, pp. 5-6). Claimant stated he was unable to work after he last worked on November 23, 1999. (CX-10, p. 6). Further, Claimant experienced no neck pains upon the first visit with Dr. Danielson. (CX-10, p. 24).

Dr. Danielson personally inspected the films of Claimant's lumbar MRI performed on "December 13, 1999" and went over them with him. Claimant had "a central protrusion at L5-S1 without any significant root compression, and there was also some protrusion at L3-4 more to the right...." (CX-10, pp. 6-7). Dr. Danielson concluded Claimant needed a CT scan and myelogram "to further demonstrate what's going on with him because he couldn't work." (CX-10, p. 7; EX-14, pp. 37-38).

On March 31, 2000, Dr. Danielson performed a myelogram on Claimant. On April 6, 2000, when he went over the results with Claimant, Dr. Danielson stated:

> There was a large disc herniation at L5-S1. The disc at 3-4 was significant. And I discussed with the patient his options of living with the situation and changing his life-style to avoid any kind of heavy activities or lifting or an operative procedure. And I explained the operative procedure to him, what I would be doing. And he said that it had been going on for quite a long time and he wasn't getting any better, and so I told him the prognosis and what to expect, you know, that he may not get immediate relief.... And so, anyway, if he didn't – I was just trying to prepare him emotionally for not being instantly helped.

At this point, Claimant wanted "to go ahead and do a microneurosurgical procedure at L3-4." (CX-10, pp. 7-8; CX-7, p. 6; EX-14, p. 44).

On November 10, 2000, Dr. Danielson performed "bilateral procedures on the L3-4 disc using a microscope." (CX-10, p. 8; EX-14, pp. 13-14). Dr. Danielson "cleaned out that disc at the 3-4 level," and "everything went well." (CX-10, pp. 8-9).

On January 16, 2001, Dr. Danielson saw Claimant and "made him maximum improvement from that level." He assigned Claimant "some restrictions of lifting 10 to 20 pounds, occasionally, [and] to avoid frequent bending, stooping, squatting, crawling." He instructed Claimant to "change position from sitting to standing to ambulating as his tolerance demanded." He "gave [Claimant] a 10 percent anatomical impairment" at the time. Dr. Danielson testified that the 10 percent impairment "was really

low because I did a bilateral, and it should have been 15 percent there. So that's an oversight on my part." (CX-10, p. 9; EX-14, p. 42).

On September 11, 2001, Dr. Danielson saw Claimant, based on a referral from Dr. Schepens. (CX-10, p. 11; EX-13, p. 23; EX-14, p. 37). According to Dr. Danielson, Dr. Schepens ordered a lumbar MRI, which was available for review. Dr. Danielson observed that "typical things were aggravating Claimant, including "any activities, increased activities." Claimant was complaining of back pain, including "a little numbness and tingling in his upper extremities." (CX-10, p. 11). Dr. Danielson stated, "And this was new with the numbness in his fingers and both hands, and I couldn't tell what that was about for sure." (CX-10, p. 12).

According to Dr. Danielson, Claimant's history was reviewed again on his September 11, 2001 visit. His history was "sort of vague about being hurt several years ago...." Dr. Danielson noted that, after his earlier injury, Claimant "got better in about four months or so, then he did some work at a machine shop in Louisiana and then Huber in Gulfport." Dr. Danielson observed that Claimant started "aggravating, I think, his prior problem" after he began working for Employer in September 1999. Dr. Danielson further discussed Claimant's history:

> ... after November 1999, [Claimant] got so bad he couldn't work anymore. And I believe he said that he last worked on November 21, '99. And so that was history that he didn't give me before. He was real vague about this worsening of his condition from his prior injury. He sort of thought it was all part and parcel of that, but then when he started working at [Employer], he got so much worse that he couldn't work.

(CX-10, pp. 10-11, 34).

Dr. Danielson observed that "confusion comes in" because Claimant is "such a poor historian." (CX-10, p. 22). Dr. Danielson stated that "a lot of trying to understand" Claimant's history occurred after Dr. Danielson performed the first back surgery. According to Dr. Danielson, it was difficult to establish "some kind of sequence" of events, and Claimant's history with Employer "all came out after the fact" because it "just didn't add up." When Claimant's history became more clear, Dr. Danielson explained, "then we try to get the history corrected the best we can, and that's what we tried to do with that second go-around when we did his next disc." (CX-10, p.

23).

Dr. Danielson stated Claimant was never able to provide any specific accident or event with Employer that caused or started his complaints. Rather, "he was just lifting, you know, doing hard, long work," which gradually "got worse." Dr. Danielson explained that such symptoms are "typical of these kinds of disc problems. The disc gradually gets a little more... worse, and pretty soon you're just dragging." (CX-10, p. 24). Dr. Danielson opined that the gradual increase in pain was especially likely with a history of a preexisting injury with documented complaints of low back pain. (CX-10, p. 25).

On September 25, 2001, a myelogram and lumbar and cervical CT scans were performed, per Dr. Danielson's recommendation.[10] (EX-14, pp. 23 and 30-32). He noted "some minor disc problems at C3-4 and a mild disc at C5-6, but none of it looked like a neurosurgical operation would be necessary." He also observed "a herniation at L2-3 with compression on the right L-3 nerve root... and there was some stenosis at the previous operative site at L3-4." Dr. Danielson concluded, "So this then brought out the probability that his pain was coming from that L2-3 disc on the right." (CX-10, p. 12; EX-14, p. 30).

Dr. Danielson stated the protrusion at the L2-3 level was a new finding that was not present on earlier studies. Likewise, Dr. Danielson stated his medical records do not indicate any diagnosis of any abnormality at the L2-3 level prior to the September 11, 2001 visit. (CX-10, p. 40).

Nonetheless, Dr. Danielson opined the protrusion at the L2-3 level was causally related to Claimant's work with Employer. He described the nature of the process of disc herniation, which is caused by an injury to the annulus that may go unobserved until a herniated disc results. He added:

> In the acid tank, he started this... I don't have any other history of injury. And so then you just link that with that situation when he was doing all the heavy lifting because that's what caused the one disc to come out. And so that other disc probably was starting to come out, but it didn't show up on the

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[10] Dr. Danielson ordered these studies because he stated Claimant's August 20, 2000 MRI films "looked like there was some defect on the scan at the post-surgical spot at L3-4, ...but I wasn't real convinced about anything definite that I could make a diagnosis." (CX-10, p. 12).

films on these earlier studies....

(CX-10, pp. 43-45).

Thus, Dr. Danielson opined that Claimant's back pain and surgery at the L3-4 level and the L2-3 level are "causally related to working with [Employer], based on an aggravation of a preexisting condition, basically a cumulative trauma basis...." Dr. Danielson affirmed that Claimant's preexisting injury and medical condition from 1998 combined with his work and repeated usage trauma at Employer to cause the condition upon which he performed surgery. Moreover, he opined Claimant's current permanent disabilities are attributable to a combination of his preexisting disability with his work injury at Employer. (CX-10, pp. 51-52).

Further, Dr. Danielson opined Claimant's "disability and the subsequent alleged injury with Employer was greater than it would have been just from the subsequent cumulative trauma." Dr. Danielson concluded that Claimant's complaints and conditions regarding his neck are not related. (CX-10, p. 52).

On November 2, 2001, a procedure "to fix" Claimant's pain was performed "on the right L2-3, a microdisectomy case." Dr. Danielson saw Claimant on November 13, 2001 and noted he was doing well. (CX-10, p. 13; EX-15, pp. 25, 30). He saw Claimant again on February 21, 2002, at which time "he, again, reached maximum medical improvement from a neurological standpoint." Dr. Danielson concluded there was "nothing more for me to do, and so he can follow up with his family doctor." He stated he would give Claimant an impairment rating of 10 percent in addition to the impairment rating (15%) previously assigned. Further, he gave Claimant temporary restrictions of lifting 10 to 20 pounds.[11]

At his deposition on July 15, 2002, Dr. Danielson gave Claimant permanent restrictions of about 25 or 35 pounds, and stated the temporary lifting restrictions would be the same after Claimant's second surgery as they were after the first surgery. Dr. Danielson has not seen Claimant since February 2002. (CX-10,

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[11] Dr. Danielson was unaware that Claimant began working for Zachry as a structural fitter "in between your November 13 [2001] visit and your February 21, 2002 visit...." (CX-10, p. 49). He concluded the job at Zachry was "a huge mistake." (CX-10, p. 54). He explained, "That doesn't mean that he broke the bank and undid what we did because I haven't seen him again. (CX-10, p. 53).

p. 13).

Dr. Steven M. Schepens, M.D.

On August 21, 2001, Dr. Schepens examined Claimant, who was experiencing low back pain. He noted patient "states he was doing well up until about 8 months ago and he started having back pain again." Claimant stated his pain "was mainly located in his back but does radiate down his legs, mainly his right leg." Claimant also stated that "whenever he is sitting up or laying down flat his arms will go numb like they are falling asleep." The numbness phenomenon had "been going on for a few months also." Dr. Schepens assessed "low back pain with history of disc herniation." Dr. Schepens ordered an MRI. (EX-15, p. 5).

On August 28, 2001, an X-ray of Claimant's cervical spine was performed. Alignment was normal and intervertebral disc spaces were well maintained. The impression revealed a "normal study of the cervical spine." (EX-15, p. 38).

On August 30, 2001, an MRI of Claimant's lumbar spine was performed. At L3-4, there was "moderate, broad-based annular disc bulge with some effacement of the anterior thecal sac" that was "not appreciably changed when compared to the annular disc bulge noted on MRI exam from December 1999." At L4-5 there was a "mild, annular broad-based disc bulge with minimal effacement of the anterior thecal sac." At L5-S1, "mild, focal disc protrusion as suggested." (EX-15, p. 36). The interpreting radiologist's impression was a history of prior lumbar spine surgery and probable minimal narrowing of the left neural foramen. (EX-15, p. 37; EX-13, p. 3).

On September 6, 2001, Claimant saw Dr. Schepens to follow-up after the MRI. Claimant reported he continued to experience back pain that was as severe as it was before his back surgery, and he still complained of numbness in his arms. Dr. Schepens assessed Claimant with chronic back pain, prescribed pain medication, and referred him back to Dr. Danielson. (EX-15, p. 4).

Dr. Terry Smith, M.D.

On April 2, 2002, Dr. Smith, whose practice is in spinal and neurological surgery, reported to Dr. Schepens discussing Claimant's history since his injury in 1998. He noted that Claimant injured himself in 1998 and that he saw a neurosurgeon, who told him that he had degenerative disc changes. He observed that Claimant began working with Employer and became worse. He noted Claimant's operations and subsequent work in Kentucky. Dr.

Smith stated that Claimant complained of back pain and "intermittent leg numbness, but no leg pain now." He also noted that Claimant "says that his arms go to sleep down to the fingertips. Sitting is worse, and standing is bet [sic]." On physical examination, he found that Claimant had "good range of motion of the back, with extension and flexion hurting equally." (EX-16, p. 4).

Dr. Smith reviewed Claimant's "MRI scans before surgery" and concluded, "I really do not see much there." Dr. Smith wrote:

> We talked about having him see a pain specialist.... He says that he can live with the pain and the only reason he is here today is because he wants to have an MRI Scan so that he can document that he did something bad to himself on the job in Kentucky. Incidentally, he just came from a Deposition regarding a potential Workers' Compensation case today and makes this known to us. I will get the MRI Scan, although with a history such as this, I do not think he could have done himself any harm at the job in Kentucky.

(EX-16, p. 5).[12]

The Contentions of the Parties

Claimant maintains that symptoms related to his October 1998 injury cleared up completely and that he was symptom-free upon beginning work for Employer. Nonetheless, even if there were a prior injury, Employer would remain liable under the aggravation rule because Claimant's work as a shipfitter for Employer aggravated his preexisting back injury.

Employer asserts that Claimant has not demonstrated a loss of wage earning capacity because he earned $5000.00 after the accident doing the same work for another employer that he was doing for Employer. Employer argues that it was never notified of Claimant's injury. Employer further alleges that Claimant has failed to prove causation. In the alternative, if Claimant could establish causation, Employer asserts Section 8(f) relief is appropriate because ample evidence exists to establish

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[12] Claimant stated in his deposition that he was injured in Kentucky and returned home as a result. He said, "And I have an appointment today at 2:30 with a neurosurgeon to find out exactly what I did." (EX-4, p. 6).

aggravation of a pre-existing injury.[13] Employer offers 10(c) as the appropriate provision for Claimant's average weekly wage determination, which results in an AWW of $451.47. Lastly, Employer asserts that there is sufficient evidence to rebut the causal relationship between Claimant's second back surgery and his employment with Employer.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

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[13] Employer asserts that the absolute defense to 8(f) relief is inapplicable because the permanency of Claimant's condition was not known until March 2002.

In the present matter, I found that Claimant's testimony generally contained factual uniformity, was honestly recalled and otherwise persuasive. Although Employer alleges Claimant provided many contradictory statements in his hearing testimony and medical records, I find that he provided sufficient testimony to establish causation of his back conditions. Moreover, regardless of any inconsistencies in Claimant's testimony, the medical evidence of record buttresses the fact that Claimant suffers from a pain or harm, as discussed more thoroughly below. From an objective standpoint, the harm or pain continued to generate symptoms for which Claimant was treated by various physicians.

Employer contends Claimant's testimony is unreliable because he stated that his back pain lasted only "about a month" after October 1998, but medical records indicate he made back and leg complaints at least five or six months after the October 1998 injury. (Employer's Post-Hearing Memorandum, p. 3; Tr. 67).

Dr. Danielson regarded Claimant as a poor historian. Based on my observation, I found Claimant's demeanor reflective of an effort to convey facts honestly. He clearly was a poor historian in terms of his recollection of dates; however, I regarded his testimony as sincere and cautiously definitive and unequivocal.

Although Claimant stated that his pain lasted about a month after the October 1998 injury, he specifically stated elsewhere that he saw Dr. Messina in March 1999 for pain that he associated with his October 1998 injury. He stated that the pain had abated somewhat by that time. (EX-4, pp. 14, 24; Tr. 67).

Dr. Messina's records indicate that he treated Claimant for pain on March 10, 1999, and recommended hamstring stretching and walking exercises. (EX-10, p. 3).

Claimant testified that his pain went completely away after his visit with Dr. Messina and that he was able to work for Ohmstede, Huber, and Employer without pain. (EX-4, pp. 14, 26). The record indicates Claimant never saw Dr. Messina again for pain. (EX-10; EX-4, pp. 24, 26).

Employment records from Ohmstede, Huber, and Employer do not reveal any injuries or complaints of pain after October 1998. (EX- 21; EX-23; EX-7). The medical evidence of record indicates that Claimant did not visit a physician again for any symptoms of pain until his work as a shipfitter for Employer. (EX-11, pp. 3-4).

Accordingly, I am unconvinced that Claimant did not suffer from a work-related injury because he stated at one point in his deposition that his pain lasted about a month. His testimony elsewhere is consistent with the medical and employment evidence of record, which demonstrates Claimant saw Dr. Messina once in March 1999 for pain and continued working without pain or injury for Ohmstede, Huber, and Employer until November 1999. This particular example of Claimant's testimony does not thus challenge the fact of his reported bodily harm and injury at Employer.

Employer also asserts that Claimant's testimony should be discredited because he offered contradictory testimony regarding when his back problems arose. Specifically, Employer argues that Claimant believed his back problem was attributable to his 1998 injury at AIF, but is now claiming that his 1999 employment with Employer makes his pre-existing back injury compensable. (Er. Post-hrg. Br., p. 4).

Claimant testified he relied on Dr. Messina's conclusion that his pain was related to the 1998 injury when he discussed his "injury" with Employer and treated with subsequent physicians. He stated that he was not aware that his symptoms were attributable to his employment with Employer until Dr. Danielson examined him after that employment. (Tr. 31-32, 61, 66-68; EX-4, pp. 10-11, 27-28). Dr. Danielson agreed that Claimant initially attributed his symptoms to his prior injury, but Claimant's history did not "add up" with his understanding of the sequence of events concerning his injury. (CX-10, pp. 10-11, 22-23). Dr. Danielson specifically opined that Claimant's back pain was causally related to working with Employer, based on the aggravation of a pre-existing condition. (CX-10, p. 51).

Thus, the record supports Claimant's contention that he did not realize his injury might be compensable until he was diagnosed by Dr. Danielson, who opined that Claimant's injury was causally related to his work with Employer. Consequently, I find Employer's contention that Claimant did not suffer from a work-related injury from his 1999 employment with Employer to be unpersuasive.

Further, Employer relies on Dr. Messina's patient history to suggest that Claimant may have been originally injured in Minnesota. (Er. Post-hrg. Br., p. 9). Claimant stated that he saw Dr. Messina once for fifteen minutes. (EX-4, p. 24). Claimant stated he did not have low back pain for a couple of years prior to March 10, 1999. (Tr. 54-55). He credibly stated that he had never been to Minnesota and had no idea why Minnesota

would be reflected in the records of Dr. Messina. (Tr. 82). Claimant's Social Security Itemized Statement of Earnings includes no reference to any employment in Minnesota. (EX-31, pp. 4-8). Claimant's uncontroverted testimony is thus supported by the record, and I find that Employer has not impugned his credibility by relying on a notation in Dr. Messina's only record of his one visit with Claimant.

Additionally, Employer asserts Claimant's work at Zachry indicates contradictory testimony and actions. Employer laments the failure of Claimant to notify Dr. Danielson before accepting the job. (Er. Post-hrg. Br., pp. 4-5). Claimant specifically stated that he did not tell Dr. Danielson or get a release from Dr. Danielson because "I figured he wouldn't give me one." (EX-4, p. 31). Dr. Danielson stated he was not aware that Claimant worked for Zachry, which was a "huge mistake." (CX-10, p. 49). Thus, Claimant's belief that the doctor would not have released him is supported by Dr. Danielson's testimony. Claimant's testimony is consistent with the employment records and medical records of Drs. Danielson and Smith. (EX-4, p. 31; CX-10, p. 49; EX-16, pp. 4-5; EX-19, p. 14). Further, Claimant's testimony was unevasive and against his interest, which supports a finding of truthfulness and believability.

Claimant further stated that he did not believe he would have been hired at Zachry without the intervention of Glen Shaw, because "I just got out of surgery November...." (EX-4, p. 4). Claimant's belief is buttressed by his work history that includes his previous employment with the golf course in Diamond Head. There, an examining physician believed that Claimant could not perform a job requiring no lifting but riding a lawnmower. Although Claimant had no problems or injuries performing his work, he explained:

> I found out that when the doctor says you can't work, you can't work. They pulled my time card, explained to me the next day there's nothing they can do. They can't override his decision at all.

(EX-4, p. 8). Consequently, Claimant's ill-advised decision to seek employment at Zachry without the consent of his doctor does not diminish the fact of his bodily injury.

Employer also argues that Claimant's testimony appears contradictory because he saw Dr. Smith "for documentation of an accident with [sic] occurred to him in Kentucky. (Emp. Post-hrg. Br., p. 5). Dr. Smith specifically noted that Claimant was seeking to "document that he did something bad to himself in

Kentucky, and "just came from a deposition regarding a potential case." (EX-16, p. 5). Likewise, Claimant testified in his deposition that he was seeing Dr. Smith that day to find out exactly what he did. (EX-4, p. 6). At the hearing, Claimant specifically testified that did not tell Dr. Smith that the only reason he was seeing Dr. Smith was to document something bad that happened in Kentucky. Rather, he stated, "I told him I messed something up in Kentucky, and I wanted to find out what it was." (Tr. 76).

Claimant's testimony is thus generally consistent with Dr. Smith's report. Further, Claimant was deposed, appeared at the hearing, and was subject to cross-examination while Dr. Smith's only evidence appears in a two-page report to Dr. Schepens. Consequently, I find Claimant's testimony more reliable than Dr. Smith's report. Additionally, it is not unreasonable that Claimant would be interested in documenting an injury so soon after a deposition specifically directed at the subject of injury and causation. Accordingly, Claimant's request of Dr. Smith fails to convince me that Claimant did not suffer a physical harm or work-related injury while working for Employer.

Thus, I find and conclude that, notwithstanding the internal inconsistencies and Claimant's decision to attempt working, Claimant's lumbar conditions are substantially buttressed by the medical records, as explained below. In light of the foregoing, I will consider whether Claimant established a **prima facie** claim for compensation for two separate lumbar injuries and a cervical injury and the applicability of the 20(a) presumption.

B. Notice to Employer

Section 12(a) of the Act provides:

> Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment.... Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

It is the claimant's burden to establish timely notice;

however, the presumption found in Section 20(b)[14] applies equally to both Sections 12 and 13 of the Act. Avondale Shipyards v. Vinson, 623 F.2d 1117 (5th Cir. 1980). Likewise, the Board has held that it is presumed under Section 20(b) that the employer has been given sufficient notice pursuant to Section 12 in the absence of substantial evidence to the contrary. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989).

In the present matter, Claimant timely filed his claim on May 30, 2000, but the employer did not receive notice of the claim until it received correspondence from DOL on July 26, 2000. (EX-2). Claimant and Dr. Danielson agree that Claimant's condition as it relates to Employer was not immediately known to Claimant upon his first visit with Dr. Danielson. Claimant stated he did not know Employer could be liable for his injury until Dr. Danielson discussed his situation with him. It thus follows that Claimant was made aware of his work-related condition by Dr. Danielson until some point before May 30, 2000.

Claimant's most recent visit with Dr. Danielson prior to May 30, 2000 occurred on April 6, 2000, when the two reviewed the results of examinations performed to "further demonstrate what's going on with him because he couldn't work." The date that Claimant filed his claim with the District Director exceeds 30 days from April 6, 2000, and the July notice to Employer likewise exceeds 30 days from April 6, 2000. Accordingly, I find that there is substantial evidence of record to conclude Claimant failed to give sufficient notice.

Failure to provide sufficient notice bars a claim unless it is excused by Section 12(d) of the Act. Under Section 12(d), failure to provide timely written notice will not bar the claim if claimant shows either that employer had knowledge of the injury during the filing period (Section 12(d)(1)) or that employer was not prejudiced by the failure to give timely notice (Section 12(d)(2)). See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32 , 34 (1989); Sheek v. General Dynamics Corp., 18 BRBS 1 (1985), decision on reconsideration, 18 BRBS 151 (1986). Prejudice can be established if an employer can show that due to

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[14] Section 20 in pertinent part provides:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary-
>
> (b) That sufficient notice of such claim has been given.

a claimant's failure to provide the written notice required by subdivisions 12(a) and (b), it has been unable to effectively investigate to determine the nature and extent of the alleged injury or to provide medical services. See Steve v. Container Stevedoring Co., 25 BRBS 210 (1991) (employer had 7.5 months before the hearing to arrange for an independent medical examination; the employer also had access to medical fully documenting the nature and extent of claimant's injury); ITO Corp. of Baltimore v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989)(When the only suggestion an employer advanced was a general one of "no opportunity to investigate the claim when it was fresh," the Fifth Circuit upheld the determination by the judge and the Board that the employer was not prejudiced).

In the present matter, there is no evidence or allegation that Claimant's untimeliness caused prejudice to Employer. Rather, Employer received notice on July 26, 2000, more than: (1) 3 months before Claimant's first back surgery; (2) more than 16 months before Claimant worked at Zachry; and (3) more than 22 months before the hearing. Consequently, I find Employer was not prejudiced by Claimant's untimely Section 12 notice.

C. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir.

1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Lumbar Injury at L3-4

Claimant testified that he suffers back and neck pain, and his testimony is supported by all of the attending physicians. Further, he has undergone two surgeries to alleviate his pain. His back pain since the accident is undisputed; however, Employer argues that the pain was not caused by Claimant's work as a shipfitter for Employer. Claimant asserts that heavy lifting, strenuous physical requirements, and the extended amount of work overtime with Employer caused his present symptoms.

a. Physical Harm or Pain

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant testified that he began experiencing pain after working "about a month" for Employer and that it was worse than the pain he felt in October 1998. He further stated that the pain gradually became worse until November 23, 1999, when he could not climb a stairwell to pick up his tools at work.

Claimant's testimony is supported by the medical evidence of record. On November 30, 1999, Dr. Tamboli first saw Claimant for complaints of low back pain, with radiation down his lower back and legs. Dr. Tamboli opined that Claimant suffered from "back pain with paresthesias and radiculopathy, with abnormal lumbosacral x-rays." On December 3, 1999, a lumbar spine MRI was conducted which revealed annular bulging of the disc at L3-4 and L4-5 that impinged "on the neural foramen on the left of that level." On March 6, 2000. Dr. Shabti also found that Claimant suffered from radiculopathy and low back pain with disc bulging and protrusion.

Dr. Danielson ordered another myelogram and CT scan that revealed a large disc herniation at L3-4 compressing the thecal sac and a central disc herniation at L5-S1 exerting pressure on the S1 root. Claimant underwent an interlaminal laminectomy,

foraminotomy, with microsurgical disc excision at the L3-4. On January 16, 2001, Dr. Danielson released Claimant to work with physical restrictions.

Based on the foregoing, I find that Claimant's credible testimony and the sound medical evidence of record clearly establish that Claimant suffered a harm or pain to his lumbar spine at the L3-4 level. Claimant has thus demonstrated the first element of establishing a **prima facie** claim for a compensable injury under Section 20(a).

In addition to meeting the first element of a **prima facie** claim, the claimant must also show that an accident at work or conditions in his workplace could have caused the harm, Kier, 16 BRBS at 129.

In the present matter, Claimant testified that he usually worked overtime, pulling lines, moving steel, lifting a 40-pound tool bucket up and down stairs daily, and lifting other things. Employer's employment records establish that Claimant usually worked overtime. (EX-6). Dr. Danielson stated that Claimant was "doing hard, long work" that started his complaints of back pain, "which is typical of these kinds of disc problems." Dr. Danielson opined that Claimant's gradual increase in pain was "especially likely" in Claimant's case. Consequently, the record reflects conditions in the workplace which could potentially cause Claimant's harm or pain.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain which disabled him on November 23, 1999, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

b. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194

F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing the connection between, the harm and employment. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

c. Conclusion

Relying on the holding of Universal Maritime Corp. v. Moore, 126 F.3d 256 (4th Cir. 1997), Employer argues the undersigned

should find the presumption under Section 20(a) was rebutted and that Claimant failed to prove the existence of a compensable injury . Specifically, Employer claims that Claimant has provided contradictory testimony regarding when his back pains arose. (Emp. Post-hrg. Br., pp. 2-3).

Employer's reliance on Moore is misplaced. Employer apparently asserts that Moore stands for the proposition that the 20(a) presumption is inapplicable when an Employer puts forth any evidence tending to cast doubt on Claimant's **prima facie** case. However, the court in Moore reiterated only the general rule that the section 20(a) presumption "falls out of the case" when an employer offers "substantial evidence to rebut the presumption." 126 F.3d at 262. Thus, the thrust of that holding compels the undersigned to consider whether substantial evidence necessary to rebut Claimant's **prima facie** case has been put forth by the Employer.

In the present matter, I find and conclude Employer has not put forth sufficient evidence rebutting Claimant's medical evidence of causation; rather, Employer offers speculation. Nevertheless, because Employer draws an analogy between the present matter and Moore, a comparison of the facts follows.

In Moore, a claimant allegedly hurt his knee and back after falling from a ladder in November 1991. Two months after the fall, the claimant filed a claim for total disability caused by injury to his right leg and knee joint. At the hearing for workers' compensation, the claimant added back complaints to his alleged injury and presented evidence of the back injury. Moore, 126 F.3d at 260.

The court in Moore noted that a treating physician affirmatively reported two months after the fall that the claimant did not complain of back pain. No medical report referred to any back pain until more than one-half year after the workplace accident. Id. at 263. Further, there was medical evidence that the claimant experienced a prior injury to his back and that he was experiencing back pains one month before the accident. Id. at 261.

Nonetheless, the claimant testified at the hearing that he experienced back pain immediately after the fall in November 1991. The court observed that "...it may appear incredible in light of [the claimant's] other testimony, his pre-hearing statement to [his physician] that he was not experiencing back pain, and the absence of any complaint to his other doctors...." The court found that all of this evidence was sufficient to

justify a fact finder to conclude that the back pain was not caused by the accident but rather by either a pre-existing condition or a subsequent related deterioration. Id. at 263.

In the present matter, on November 30, 1999, one week after Claimant left Employer, Dr. Tamboli treated Claimant for complaints of low back pain, with radiation down his lower back and legs. Since then, Claimant has undergone two surgeries and continued to be treated for back pain by Drs. Shabti, Dr. Leatherwood, Danielson, Smith, Schepens.

Further, Dr. Danielson offered the only medical opinion of record that discusses Claimant's symptoms, injury, and employment with Employer. His conclusion was that Claimant's back pain and surgery at the L3-4 and the L2-3 levels were causally related to working with Employer, based on an aggravation of a pre-existing back condition.[15]

Based on Dr. Danielson's qualifications and history with Claimant, his medical opinion is well-reasoned and persuasive. No physician of record has ever opined that Claimant's lumbar injuries were not caused from his employment which could directly rebut causation. Thus, unlike Moore, Employer's argument and evidence is insufficient to justify a conclusion that Claimant's back pain was not caused or aggravated by his work accident but rather by either a pre-existing condition or a subsequent related deterioration.

Accordingly, in light of the of the liberal construction and humanitarian nature of the Act, I find that Employer's speculation has failed to show substantial and countervailing evidence that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain.

Nonetheless, even if Employer could rebut Claimant's **prima facie** showing, a review of the record considered as a whole establishes that Claimant suffered an injury that was caused or aggravated by his employment activities with Employer.

Medical records indicate Claimant sought treatment with Drs.

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[15] Employer argues there is a "tremendous credibility question" regarding Dr. Danielson because he has not been reimbursed for either back surgery. (Emp. Post-hrg. Br., pp. 16-18). Employer's allegations are uncorroborated in the record and entirely unpersuasive.

Guidry and Messina in 1998 and 1999, but did not seek any further treatment for pain for more than eight months thereafter until he sought treatment with Dr. Tamboli on November 30, 1999.

Meanwhile, Claimant stated that he worked for Ohmstede as a machinist without any injuries or complaints of pain or sickness until he quit to move home. Ohmstede's employment records indicate Claimant worked 309.78 hours in the first quarter of 1999. He took no vacations, sick leave, or holidays. Likewise, he took no voluntary leave, was not laid off or terminated. (EX-21, p. 48). On March 25, 1999, Ohmstede's employment records indicate Claimant was terminated, indicating "moving back home." (EX-21, p. 5).

Claimant also stated he worked for Huber as a fitter and that he suffered no injury nor felt any pain on that job. An entry on Claimant's employment application provides, "Hired 4/5/99 Resigned 8/13/99 $11.00/Hr." (EX-23, p. 2). As a fitter for Huber, Claimant earned gross pay of $7,484.55 during 1999. (EX-23, p. 4). There is no record of Claimant's pain or any injury in Huber's employment records.

Claimant stated he had no symptoms of pain upon entering employment with Employer. Employer's employment records indicate Claimant was physically examined on September 17, 1999, and the attending physician's comments include, "good general health, no physical problems."[16] (EX-7, p. 34).

Claimant testified that he usually worked overtime performing demanding physical labor as a shipfitter for Employer. He worked at Employer "about a month" until he started feeling pain. About a month before he had to quit, Claimant stated he had to take a day or two off because of the back pain.

Employer's records indicate Claimant started as a shipfitter on September 20, 1999. He worked three weeks without any absences. On October 12, Claimant was absent for the first time. He was absent thereafter on October 22 and 28, 1999. In November, Claimant was absent on November 3 and 18, 1999.

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[16] Employer questioned Claimant about the report of that examination, because Claimant failed to indicate conditions which he may have had in the past. Specifically, he failed to place a check-mark in boxes next to a column of questions on a page with three columns of questions to check. (EX-7, p. 33). Claimant responded he "didn't even know" he missed the column of questions and added the doctor who signed the report "must not have checked it too good." (EX-4, pp. 18-19).

Nonetheless, Claimant earned overtime during the weeks of November 3 and 18, 1999. (EX-7, pp. 1, 10). Moreover, he earned overtime for six weeks of the nine full weeks he worked for employer. (EX-6, p. 1; EX-7, p. 1).

When Claimant first sought treatment for his back pain on November 30, 1999, Dr. Tamboli diagnosed "back pain with paresthesias and radiculopathy with abnormal lumbosacral X-rays." According to Dr. Tamboli, "Claimant saw an orthopedist who provided pain medications and muscle relaxants that did not significantly help." Employer infers from this statement that Claimant suffered pain continuously since his treatment with Dr. Messina.

On the other hand, Claimant specifically disputed the conclusion that he was in pain for the entire amount of time after his visits with Drs. Messina and Guidry. Rather, Claimant maintained that he physically recovered from the original pain without the use of ineffective drugs and was able to work without pain for Ohmstede and Huber. He stated he was even able to work for some time with Employer before he experienced back pain.

Employer also relies on Dr. Shabti's March 6, 2000 reference to Claimant's reported injury in October 1998 to suggest Claimant suffered symptoms attributable that injury. Despite his communication problems with Claimant, Dr. Shabti's patient history is consistent with Claimant's testimony that he had no idea his work with Employer could have caused any of his symptoms until after he began treating with Dr. Danielson on March 16, 2000. It is also consistent with Dr. Danielson's testimony that Claimant's understanding of the sequence of events just "didn't add up."

According to Dr. Danielson, Claimant was vague about his history because he incorrectly thought his symptoms were "all part and parcel" of his October 1998 injury. Relying on Claimant's medical records, his history with Employer, which was "history he didn't give me before," and his symptoms that manifested during work and became "so much worse that he couldn't walk," Dr. Danielson concluded that Claimant's symptoms and surgeries were causally related to his work with Employer, based on an aggravation of a preexisting condition.

Drs. Schepens and Smith treated Claimant, but neither physician offered any opinion regarding the cause of the symptoms. Dr. Schepens noted Claimant suffered pain and ordered an MRI. Dr. Schepens concluded that Claimant suffered chronic back pain and referred him back to Dr. Danielson. Dr. Smith

noted that Claimant suffered an injury in 1998 and began working with Employer in 1999, when he "got worse." Dr. Smith mentioned Claimant's history at Zachry and did not think that he "could have done himself any harm" at the job with Zachry." Dr. Smith discussed treatment with Claimant, including having him see a pain specialist and a "discography to see if fusion might be of some help."

Employer asserts, "based upon his own statements to Dr. Smith, Claimant hurt himself again at Zachry, thus producing an intervening cause eliminating Employer/Carrier's liability from the point Claimant left Zachary [sic]." (Emp. Post-hrg. Br., p. 8). If there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). A subsequent injury is compensable if it is the direct and natural result of a compensable work injury "as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." See Mississippi Coast Marine, Inc. v. Bosarge, 637 F.2d 994, 1000, 12 BRBS 969 (5th Cir. 1981); Bludworth Shipyard, supra. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of disability attributable to the second injury. See Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987), aff'd mem, No. 89-4803 (5th Cir. 1990).

Employer's argument is initially unavailing, because Dr. Smith's letter specifically concludes he does not think that Claimant could have done himself any harm at Zachry. Dr. Smith's letter does not offer any opinion regarding the cause of Claimant's injuries in 1998 or 1999. Although Dr. Smith does not think Claimant could have done himself any harm in Kentucky "with a history such as this," it is unclear on what information he relied to form his conclusion. Accordingly, his opinion does not appear to be well-reasoned in light of his brief treatment of Claimant and his failure to consider the effects of the other accidents in rendering his opinion.

Likewise, Claimant stated he experienced pain on the job for Zachry, but he also stated, "I wouldn't know if I done it Kentucky. It was probably something after the surgery. I could have done that sitting at home."

Dr. Danielson also explained that Claimant's work with

Zachry "doesn't mean that he broke the bank and undid what we did because I haven't seen him again." Accordingly, I find that the Employer has failed to present substantial evidence that Claimant's present condition was caused by the subsequent non work-related event at Zachry.

Thus, the record as a whole buttresses Claimant's statement that he was injured in October 1998, but physically improved within five or six months, during which time he was able to begin working again as a drill operator and machinist for Ohmstede and Huber. After working overtime performing heavy lifting and pulling as a shipfitter for Employer, Claimant began missing work and eventually quit due to disabling pain on November 23, 1999.

After that time, Claimant treated with numerous physicians for back pain and relied on his understanding from Dr. Messina's comments to provide an incomplete history with attending physicians. Dr. Danielson is the only physician of record who offers an opinion of causation, which stands unrebutted. Dr. Danielson's opinion is well-reasoned and persuasive, given his qualifications and treatment history with Claimant. It is consistent with Claimant's testimony and the medical evidence of record. Thus, I find that the preponderance of the probative evidence conclusively establishes that Claimant's work with Employer aggravated and accelerated his pre-existing lumbar problems, thereby causing his lumbar injuries at the L3-4 levels.

2. Lumbar Injury at L2-3

a. Physical Harm or Pain

Claimant also alleges that he suffered a lumbar injury at L2-3 as a result of his work with Employer. No objective evidence of any injury at L2-3 was observed until September 25, 2001, almost two years after the date Claimant last worked with Employer. The length of time that passed between Claimant's injury on November 23, 1999 and the first indication of the bulge at L2-3 make it very difficult to conclude his injury at that level was caused by his injury on November 23, 1999.

Although Dr. Danielson offered a theory based on a bulging tire to attribute a causative link between Claimant's injury at L2-3 and his work-related injury on November 23, 1999, I find that his explanation is implausible based on the facts of this case, and does not amount to a well-reasoned opinion, particularly in light of a total lack of objective evidence until September 25, 2001. Consequently, I find that Claimant has not established that he suffered a harm or pain to his lumbar spine

at L2-3 as a result of his November 1999 injury or any causal link thereto. Moreover, Claimant has not rationally established that his November 1999 job "injury" or working conditions in November 1999 could have caused his L2-3 injury and symptomatology in September 2001. Therefore, I find that he has failed to establish a **prima facie** claim for compensation with respect to his alleged L2-3 injury. As a result, he is not entitled to the Section 20(a) presumption that his alleged neck injury arose out of and in the course of employment.

3. Cervical Injury

a. Physical Harm or Pain

Claimant also alleges that he suffered a cervical injury as a result of his work with Employer. Claimant failed to report any cervical injury until September 11, 2001, almost two years after the date he last worked with Employer. The latent appearance of this alleged injury makes it highly unbelievable that it was related to his employment with Employer. Further, my conclusion that the cervical condition is not causally related to Claimant's work with Employer is buttressed by the sound medical reports of Drs. Danielson and Schepens.

Dr. Danielson specifically opined that Claimant's complaints and cervical spine symptoms were <u>not</u> related to Claimant's work with Employer. He stated that he saw some bulging or protrusions but he did not think it was anything requiring surgical treatment. He also opined that the cervical condition was not related to Claimant's injury because he "hadn't complained of it before [September 11, 2001]," which coincidentally is contemporaneous with his alleged L2-3 lumbar injury.

Dr. Schepens likewise did not opine that Claimant suffered from cervical symptoms on his last visit with Claimant on September 6, 2001. Although he observed Claimant was reporting numbness in his arms, he opined Claimant suffered from chronic back pain. The September 6, 2001 visit was a follow-up to Claimant's X-ray of his cervical spine performed on August 28, 2001. That report indicated no fracture or dislocation. Alignment was "normal" and disc spaces were "well maintained." The impression included, "Normal study of the cervical spine." (EX-15, p. 38).

Additionally, Dr. Smith's April 2, 2002 letter to Dr. Schepens specifically observed that Claimant had a "good range of motion of the neck." He also noted that Claimant's cranial nerves were intact. Other than noting that Claimant complained

that his arms go to sleep down to the fingertips," Dr. Smith did not observe any cervical defects.

Claimant also testified that he did not experience cervical symptoms until "after my first surgery." Thus, Claimant maintains his cervical symptoms did not manifest until some point after November 10, 2000.

Accordingly, I find Dr. Danielson's medical opinion to be well-reasoned and persuasive in light of his qualifications and treatment history with Claimant. Further, none of the other physicians dispute Dr. Danielson's medical opinion regarding Claimant's cervical condition being unrelated to the November 1999 injury.

Thus, I find that Claimant has not established that he suffered a harm or pain to his neck as a result of his November 1999 injury. Consequently, I find that he has failed to establish a **prima facie** claim for compensation. As a result, he is not entitled to the Section 20(a) presumption that his alleged neck injury arose out of and in the course of employment.

D. Nature and Extent of Disability

Having found that Claimant's cervical and L2-3 injuries are not compensable but that he suffers from a compensable lumbar injury at L3-4, the burden of proving the nature and extent of his disability, which is related to his lumbar injury, rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

A claimant does not have to be bedridden to be totally disabled. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 395 U.S. 976 (1969). The fact that a claimant works after his injury does not preclude a finding of total disability. Haughton Elevator Co. v. Lewis, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), aff'g 5 BRBS 62 (1976).
The Board has admonished that a broad application of these cases should not be applied and has emphasized that decisions to award total disability concurrent with a period where a claimant is working are the exception and not the rule. Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 145 (1980); Chase v. Bethlehem Steel Corp., 9 BRBS 143 (1978); Ford v. Sun

Shipbuilding & Dry Dock Co., 8 BRBS 687 (1978).

Facts supporting disability for working claimants involve "extraordinary effort," whereby a claimant continues employment due to an extraordinary effort and in spite of excruciating pain and diminished strength. See Haughton Elevator Co., supra at 451; Richardson v. Safeway Stores, 14 BRBS 855, 857-58 (1982).

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant's last day at Employer was November 23, 1999, when he experienced pain that was too disabling to continue working. The date Claimant reached maximum medical improvement is at issue. Based on the medical evidence of record, particularly Dr. Danielson's opinion, I find and conclude that Claimant reached maximum medical improvement with respect to his lumbar injury at L3-4 on January 16, 2001.

Dr. Danielson began treating Claimant on March 16, 2000 for symptoms Claimant experienced after the injury on November 23, 1999. Dr. Danielson continued treating Claimant until his last visit in February 2002. Dr. Danielson performed two back surgeries on Claimant on November 10, 2000 and on November 2, 2001. Dr. Danielson concluded Claimant reached maximum medical improvement on January 16, 2001, after the first surgery. He assigned Claimant restrictions of lifting 10 to 20 pounds, occasionally, and to avoid frequent bending, stooping, squatting, or crawling. He gave Claimant a 10 percent "anatomical impairment on January 16, 2001, but testified that he should have

given Claimant a 15 percent permanent impairment.

On February 21, 2002, Dr. Danielson found that Claimant again reached maximum medical improvement after a second back surgery which has been found to be unrelated to his work at Employer. Dr. Danielson noted that there was nothing more he could do, and referred Claimant back to his family doctor. Dr. Danielson gave temporary lifting restrictions of 10 to 20 pounds. He gave Claimant permanent lifting restrictions of about 25 or 35 pounds, and stated the lifting restrictions after the second surgery would be the same as they were after the first surgery.

Employer points out that Dr. Danielson was not aware that Claimant worked at Zachry in Kentucky, where he "returned to work doing essentially the same work...." Further, Employer offers, "Even Claimant's physician stated that 'that sort of puts a halt to your limitations, doesn't it, restrictions if he's been doing that." (Emp. Post-hrg. Br., p. 7). This argument is unpersuasive because Dr. Danielson made that statement while he was equally uninformed that Claimant left Zachry after "a little over a month" because he claimed that his pain was "too severe" to continue. Employer nonetheless acknowledges that Claimant complained of pain that was "too severe" for him to continue at Zachry. (Emp. Post-hrg. Br., p. 7).

Further, Employer overlooks Claimant's uncontradicted testimony that he worked for Zachry under conditions that were modified by Glen Shaw to accommodate his physical condition after the surgery. Claimant stated he still carried a 40-pound tool box, but would have to find "either someone to help me or get a crane" to help lift certain things he could formerly lift by himself. (EX-4, p. 5). He stated he had no problems with having to ask co-workers for help. According to Claimant, his co-workers were "real understanding." They understood that he was "trying to provide for my family." Nonetheless, Claimant experienced constant pain that increased until it was too severe to continue working. (EX-4, pp. 5-6).

Thus, Claimant's work history supports Dr. Danielson's conclusion that Claimant reached maximum medical improvement on January 16, 2001. While he was not pulling cables or lifting other heavy equipment as he did for Employer, he continued to carry a tool box that weighed in excess of the temporary lifting restrictions that Dr. Danielson assigned on January 16, 2001. He began experiencing pain that became severe, causing him to quit on January 12, 2002. Claimant did not work again until he saw Dr. Danielson on February 21, 2002, when he had improved to the point that Dr. Danielson concluded he had reached maximum medical improvement.

November 23, 1999 - January 15, 2001

Based on the medical evidence of record, I find the medical opinion of Dr. Danielson most persuasive and well-reasoned to establish that Claimant reached maximum medical improvement on January 16, 2001. Dr. Danielson was in a superior position to establish a suitable date of maximum medical improvement as the treating physician who performed both surgeries. He is the only physician of record who offers a date of maximum medical improvement after Claimant underwent surgery. Because I find and conclude that Claimant reached maximum medical improvement on January 16, 2001, all periods of disability prior to that date are considered temporary under the Act. Therefore, Claimant is entitled to temporary total disability compensation benefits from November 23, 1999, the date on which his pain precluded him from working, through January 15, 2001.

January 16, 2001 - present

Thereafter, Claimant's condition became permanent. Dr. Danielson opined that Claimant would likely remain permanently disabled from participation in heavy duty work; however, he concluded that Claimant could return to light duty work after the date he reached maximum medical improvement. Dr. Danielson opined Claimant's permanent restrictions include not lifting more than 25 to 35 pounds. It should be noted that, although Claimant was released to return to light employment by Dr. Danielson, Employer failed to establish suitable alternative employment as discussed infra. Thus, because Claimant was unable to return to his job as a shipfitter, lifting heavy objects, including his 40-pound tool box, after reaching maximum medical improvement on January 16, 2001, he has established a **prima facie** case of total disability from January 16, 2001 to the present.

F. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

(1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained

to do?

(2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that

particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991). In so concluding, the Board adopted the rationale expressed by the Second Circuit in Palumbo v. Director, OWCP, 937 F.2d 70, 76 (2d Cir. 1991), that MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis." The Court further stated that ". . . It is the worker's inability to earn wages and the absence of alternative work that renders him totally disabled, not merely the degree of physical impairment." Id.

Although Employer presented evidence of Claimant's employment prior to and after his job as a shipfitter, Employer failed to specify any job that Claimant could perform within his permanent restrictions. There is no evidence of record that Employer offered Claimant any internal job with Employer. Likewise, Employer has not offered any vocational evidence establishing suitable alternative employment. The precise nature and terms of job opportunities constituting suitable alternative employment is unclear, given Claimant's age and background.

Rather, the record establishes Claimant was able to work as a shipfitter for AIF until the pain in his back precluded him from continuing that job. After that job, Claimant was able to work as a drill operator and machinist for Ohmstede and Huber. Upon his return to work as a shipfitter for Employer, Claimant suffered cumulative trauma that combined with his permanent partial disability to permanently disable him from working as a shipfitter.

Claimant's work history since his work-related injury on November 23, 1999 also fails to establish suitable alternative employment. He was dismissed from a golf course job when a physician deemed his back too great a risk after 4 days of employment riding a lawnmower. His pain precluded further employment as a fitter for Zachry after a little over a month on the job. Since his tenure at Zachry, Claimant has not worked. Thus, I find that Claimant is unable to return to his former job as a shipfitter, and Employer has failed to establish any

suitable alternative employment.

In view of the foregoing, I find and conclude that Claimant has been permanently totally disabled since January 16, 2001, and is entitled to permanent total disability compensation benefits therefrom to present based on his average weekly wage of $502.27, as determined below.

G. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

Claimant worked as a shipfitter for only 10 weeks for the Employer in the year prior to his injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not

substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which he was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

I conclude that because Sections 10(a) and 10(b) of the Act can not be applied, Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where he was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.
Pursuant to the holding of Miranda, Claimant's average wage should be based on his earnings for the ten weeks that he worked for Employer because a calculation based on the wages at the

employment where he was injured would best adequately reflect Claimant's earning capacity at the time of the injury. Claimant worked for ten weeks for Employer, earning gross pay of $5,022.65. (EX-7, p. 1). Accordingly, I find that Claimant's average weekly wage was **$502.27**.

H. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an

employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

In the present matter, Claimant relied on the recommendation of Dr. Danielson to justify the need for surgery at the L3-4 level. Dr. Danielson reviewed Claimant's medical records when he first saw him on March 16, 2000. He ordered another CT scan and myelogram of Claimant's spine that he reviewed with Claimant on April 6, 2000. Dr. Danielson concluded that surgery was necessary because of a large disc herniation at L3-4, and he performed a disc excision, laminotomy, and foraminotomy on November 10, 2000. Dr. Danielson specifically attributed the herniation at L3-4 to Claimant's work-related injury on November 23, 1999, when he aggravated his pre-existing condition. I so find. Accordingly, Employer/Carrier are liable for all reasonable and necessary medical treatment, including surgery, related to his L3-4 work injury.

On the other hand, Employer relies on Dr. Smith's comment "I reviewed the MRI scans before surgery and I really do not see much there" to question whether the surgery was reasonable or necessary. Dr. Danielson has been Claimant's treating physician, examined Claimant numerous times, and has better familiarity with Claimant's condition and symptoms than any other physician. Further, as mentioned above, I do not find that Dr. Smith's report to be a reliable, well-reasoned opinion in view of the vagueness of its formation. Consequently, I place more probative value on Dr. Danielson's opinions than on those of other examining physicians.

Employer asserts Claimant's November 2001 surgery at the L2-3 level was unreasonable and unnecessary because no protrusion at

the L2-3 level was present until September 2001. As discussed above, I do not find Dr. Danielson's opinion regarding Claimant's injury at L2-3 well-reasoned. Consequently, I find that there is insufficient evidence of record to establish that Claimant's surgery at L2-3 was a natural and unavoidable result of the work injury he sustained on November 23, 1999 and accordingly Employer/Carrier is not responsible for any medical treatment, including surgery, related thereto.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

The employer's knowledge of the claimant's injury triggers the duty to pay or controvert. Benn v. Ingalls Shipbuilding, Inc., 25 BRBS 37, 39 (1991), aff'd sub nom. Ingalls Shipbuilding v. Director, OWCP, 976 F.2d 934, 26 BRBS 107 (CRT) (5th Cir. 1992). Section 14 requires that a controversion be filed within 14 days of the employer's awareness of the injury. 33 U.S.C. § 914(d); Maddon v. Western Asbestos Co., 23 BRBS 55, 59 (1989). The employer's knowledge of the claim is irrelevant. Benn, 25 BRBS at 39; Davenport v. Apex Decorating Co., 13 BRBS 1029, 1041 (1981), overruled in part by Huneycutt v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 142 (1985)(notice was not timely where it was filed in close proximity to the time of filing of claim, but more than six years after injury).

In the present matter, Claimant was injured on November 23, 1999, but he filed his claim for compensation on May 30, 2000. (EX-1). Employer received notice of Claimant's claim on July 26, 2000. (EX-2). Employer filed its controversion on August 1, 2000. (EX-3).

Claimant stated that he discussed his prior medical condition with three employees of Employer: (1) Harvey Toche; (2) "Ms. Iris;" and (3) Rick Grimstead. Mr. Toche, lead man on Claimant's job, was the only one of those three to testify, and he could not recall talking with Claimant at all on November 23, 1999; however, he stated that injuries on the job were routinely reported at Employer. Likewise, Mr. Favre testified that he had no recollection of Claimant, who Mr. Favre would "deal with" through the lead man. Mr. Favre reiterated that work-related

injuries would be documented as a matter of standard procedure.

Claimant stated Mr. Toche appeared concerned that Claimant hurt himself on November 23, 1999, but Claimant reassured him that he did not hurt himself. Rather, Claimant told Mr. Toche that "it's from another thing, a neurosurgeon done seen me in Baton Rouge, and I understand what it is, and I can't avoid, you know." (Tr. 31). Thus, Claimant's testimony and his supervisors' poor recollection of the events on November 23, 1999 establish Claimant related something about his condition to Mr. Toche, who did not file a report. Accordingly, I find that Employer was not aware of any work-related injury until July 26, 2000, when it received notice of Claimant's claim filed on May 30, 2000.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[17] Thus, Employer was liable for Claimant's permanent total disability compensation payment on Wednesday, August 9, 2000. Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by August 23, 2000 to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer filed a timely notice of controversion on August 1, 2000. Employer is therefore not liable for Section 14(e) penalties.

VI. SECTION 8(f) OF THE ACT

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

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[17] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f). See Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that a claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. 908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to

hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. Pre-existing permanent partial disability

Employer alleges, and I find, that the medical evidence of record establishes that Claimant had a pre-existing permanent partial disability as a result of his congenital spinal condition. See Equitable Equip. Co. v. Hardy, supra, 1194 (False fusion of the joints, a back impairment, is a permanent disability); Greene v. J.O. Hartman Meats, 21 BRBS 214, 218 (1988) (Degenerative disc disease may be a pre-existing partial disability).

Medical evidence in existence before Claimant's November 23, 1999 injury, as noted above, consisting of reports and opinions of Drs. Guidry and Messina, indicate Claimant was observed by several physicians who noted that he had transitional segments and degenerative disc disease. Congenital, transitional segments and fusion of the discs are obviously a permanent condition. Thus, the medical record predating Claimant's work-related injury on November 23, 1999 establish that Claimant had a permanent preexisting partial disability. I find and conclude that Employer established Claimant suffered a permanent partial pre-existing disability at the time of his work-related injury on November 23, 1999.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

An injury or condition is manifest if diagnosed and identified in a medical record which provides the employer with constructive knowledge of its existence. Director, OWCP v. Vessel Repair, Inc. (Vina), 168 F.3d 190, 196 (5th Cir. 1999). The manifestation requirement will be satisfied where the employer can show that the preexisting injury or condition had been documented or otherwise shown to exist prior to the second injury. American Ship Building Co. v. Director, OWCP, 865 F.2d 727, 732 (6th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Company, 23 BRBS 420 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., supra.

A review of the medical records that pre-date Claimant's November 23, 1999 injury reveal that Claimant was diagnosed with congenital spinal aberrations and back pain that was ongoing for 5 months. I find that these medical records disclose Claimant suffered from a permanent back condition. I further find that such records were available at the time of his injury. Thus, I find and conclude that Claimant's pre-existing back injury was manifest to Employer at the time of Claimant's November 23, 1999 work injury.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone,

Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

I find that Claimant's permanent total disability which occurred after his November 1999 work-related injury is not due solely to that accident. Dr. Danielson opined that Claimant's existing conditions are causally related to his work with Employer, based on an aggravation of a preexisting condition. He found that Claimant's preexisting congenital condition was aggravated by his injury in October 1998 which combined with the cumulative trauma at L3-4 he sustained with Employer to cause Claimant's conditions for which he treated and operated. Dr. Danielson further concluded that Claimant's preexisting disability and injury from the subsequent cumulative trauma with Employer was greater than it would have been had Claimant suffered only the subsequent cumulative trauma.

Dr. Danielson's opinion is well-reasoned and persuasive, and his opinion is uncontroverted. Thus, I find that Claimant's pre-existing physical back condition has combined with his physical injuries from the November 1999 work-related cumulative trauma, causing him to be unable to return to his former job position as a shipfitter resulting in Claimant being permanently totally disabled. Likewise, if suitable alternative employment had been demonstrated, I also find that Claimant's permanent partial disability assigned by Dr. Danielson is materially and substantially greater than that which would have resulted from only the subsequent cumulative trauma.

Accordingly, I find and conclude that Employer established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act and is eligible to receive Section 8(f) relief.

4. Timeliness of Employer's Petition for Second Injury Fund Relief

Employer alleges that it timely filed its petition. The Office of Worker's Compensation Program (OWCP) did not dispute Employer's argument in its post-hearing brief. Thus, I find that Employer's Petition for Second Injury Fund Relief was timely filed.

5. Whether Claimant suffered a second injury

OWCP argues Claimant did not suffer a second injury entitling Employer to relief under Section 8(f). Because I have already found that Claimant had a preexisting, permanent partial disability that combined with Claimant's cumulative trauma at Employer to contribute to the seriousness of his injury, I find OWCP's argument to be unpersuasive.

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[18] A service sheet showing that

[18] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law

service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 23, 1999 to January 15, 2001, based on Claimant's average weekly wage of $502.27, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from January 16, 2001 to present and continuing thereafter based on Claimant's average weekly wage of $502.27, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2001, for the applicable period of permanent total disability.

4. Employer's obligation is limited to the payment of 104 weeks of permanent benefits and after cessation of payments by Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's November

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judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 19, 2001**, the date this matter was referred from the District Director.

23, 1999 work-related injury at L3-4, pursuant to the provisions of Section 7 of the Act.

6. Employer/Carrier is not responsible for medical expenses arising from Claimant's cervical injury or lumbar injury at L2-3.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 5th day of November, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge